

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs April 7, 2009

IN RE C.S.

Appeal from the Juvenile Court for Anderson County
No. J-24487 April Meldrum, Judge

No. E2008-02157-COA-R3-PT - FILED MAY 6, 2009

This case involves an appeal concerning the termination of parental rights. L.W. ("Grandmother") filed a petition seeking to terminate the parental rights of her daughter, T.S., ("Mother") and James (Jim) R.¹ ("Father") to the minor child, C.S.² After a trial, the Juvenile Court found and held *inter alia*, that clear and convincing evidence existed to terminate Mother's parental rights to C.S. based upon Tenn. Code Ann. § 36-1-102 (1)(A), abandonment, and that the Mother's lifestyle has led to a persistence of conditions based upon Tenn. Code Ann. §36-1-113(g)(3) and that it is in the child's best interest to terminate the Mother's parental rights. Mother appeals the termination of her parental rights to the minor child C.S. We affirm.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Juvenile Court Affirmed;
Case Remanded**

JOHN W. MCCLARTY, J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J. and CHARLES D. SUSANO, JR., J., joined.

Brian J. Hunt, Clinton, Tennessee for the Appellant, T. S.

Brennan Lenihan, Oak Ridge, Tennessee for Appellee, L.W.

¹The petition against the Father was not acted upon in that he was not properly before the court and therefore not a party to this appeal.

²Initials of the minor child will be used to protect his anonymity.

OPINION

I.

FACTUAL BACKGROUND

This case was tried before the Juvenile Court of Anderson County on January 15, 2008.

The record shows that the minor child, C.S. was born on November 26, 2005. Mother testified at trial that she voluntarily placed C.S. in the care of Grandmother on June 1, 2006, because of her criminal charges, housing issues and her drug problem. She has not seen C.S. since June 4, 2006. However, Mother testified that at one point she called Grandmother's house but was told by Grandmother's roommate that the police would be notified if she came to the residence. Grandmother's roommate denied this accusation during her testimony.

Mother further testified that she is presently on state probation in Knox County and misdemeanor probation in Oak Ridge. The convictions are felony forgery and theft of property.

Mother was in Tennessee Prison for Women from November 19, 2002, to January 2, 2005, and in June 2006, she served 13 days in Knox County for theft and 11 or 12 days in Anderson County for theft.

The parties stipulated that Mother was incarcerated from January 27, 2007, to June 19, 2007, in the Women's Prison and from August 22, 2007, until October 5, 2007, in the Women's Knox County Detention Facility. Mother testified that she currently resides at White Spirit Lodge, a recovery half-way house, where she is in intensive outpatient therapy four times a week. She admitted a drug problem for about 15 years continuously and noted crack cocaine was her primary drug of choice. She had been living at White Spirit Lodge since November 15, 2007. Prior to living there she resided with a friend on Skyline Drive in Knoxville for a few months, and prior to that she had lived at another half-way house, Eagle's Nest. Before Eagle's Nest, she was incarcerated. Mother further testified that she was awaiting prosecution for a pending felony that occurred "in April or May" of 2006.

Mother testified that she had been employed at a Sonic fast food restaurant in Knoxville for one and a half weeks. Prior to Sonic, she had worked at Whitehouse Properties for about a month as a maid. Mother indicated she had worked at a Burger King for a week after she was released from prison on October 5, 2007, and since June of 2006, she has never been employed for longer than three months. As far as expenses are concerned, Mother stated that she paid \$120.00 per week in rent, but was two weeks behind. She also had probation fees and court costs to pay. Although Mother has been ordered to provide child support to Grandmother, she has only made one full payment.

Mother further testified that the last time she failed a drug test was in December, 2006, and

the last time she used drugs was January 21, 2007. Although Mother claimed at trial that she was “about to complete” outpatient treatment for her addiction, she provided no documentary proof of her pending completion.

Mother also testified that she has not sent any cards or presents to C.S. for his birthdays or Christmases and after September or October 2006, did not make any efforts to have contact with her child. She admitted that, presently, she does not have means to care for C.S.

Grandmother testified that C.S. is her grandson and Mother is her daughter. C.S. has been in her care since June 1, 2006, and Mother last saw him on that date. She stated prior to June 1, 2006, she took care of C.S. when Mother was in trouble and that she has provided for all of his needs since June 1, 2006.

Grandmother further testified that Mother had signed a document asking that custody of C.S. be given to Grandmother and that she was given full custody of C.S. by the Court after a finding of dependency and neglect. She corroborated Mother’s testimony that Mother has not sent any cards, or presents for C.S.’s birthdays or Christmases.

Grandmother also testified that she has a stable job with regular hours and a stable residence. She further testified that she provides C.S. with appropriate medications and day-care. She also stated that Mother knows her address and phone number, but has never called or visited C.S.

Grandmother went on to testify that the petition to terminate Mother’s parental rights was filed in August, 2007, and Mother has not visited, seen, or contacted C.S. since June 1, 2006. Grandmother noted she has not prevented Mother from having any contact with C.S. and has never told Mother that she could not have contact nor has she instructed anyone else to tell Mother that she could not have contact with her minor child.

She also testified that Mother was ordered to pay child support and has paid three times with the last two being partial payments. Grandmother stated she does not know about Mother’s present housing situation and that she is able to take C.S. to all of his doctor appointments and provide for his food and clothing.

Ann Stanton, Grandmother’s longtime friend and owner of the house where Grandmother and C.S. live, testified that she and Grandmother have lived together sharing expenses for some time and that Grandmother can provide for C.S. on her own but it is better with their combined incomes. She further testified that Mother has never called the house since Grandmother had custody of C.S. and that Mother was not welcome at her house because of her prior conduct. Ms. Stanton stated if Mother came to her house she would be asked to leave but she has never prevented Mother from coming on to her property to see C.S. if she so desired but Mother has never taken advantage of this opportunity. She testified that Mother does not have a stable home environment, does not keep a job, has no transportation and chooses a life of drugs.

Judy Hurley, a friend of Mother's, testified that she met Mother at a half-way house in June 2007, and that she has seen significant progress in Mother's condition but nevertheless Mother's recovery will take a long time. She does not think that Mother is in a position to have custody of C.S. at this time but does feel that she should have some contact with her minor child.

II.

RULING IN THE TRIAL COURT

After the trial, the Juvenile Court entered an order and amended order both nunc pro tunc to January 15, 2008, finding and holding, *inter alia*:

1. That there is clear and convincing evidence to terminate Respondent's [Mother's] parental rights.
2. That the [Mother] has willfully abandoned the child based upon T.C.A. 36-1-102. During the months of September through December the [Mother] had no visits, nor any contact with the minor child.
3. That the [Mother's] lifestyle has led to a persistence of conditions based upon T.C.A. 36-1-113(g).
4. That there was a period of four months preceding the filing of the Petition that the [Mother] stipulated she was not incarcerated. That she willfully failed to visit the child, made no responsible steps to procure any visits or contact, and did not even attempt to do so.
5. That the [Mother] willfully failed to provide support for the minor child when she was not incarcerated. The court finds that the one payment was token. Furthermore, that during this time the [Mother] was able to purchase crack cocaine.
6. That the [Mother's] conditions persisted throughout the time of filing of the Petition and all prior to. That she may have made progress with regard to her sobriety. However, that there was no progress regarding employment, staying out of jail, housing and/or incarceration. Furthermore, there is little likelihood of the [Mother] remedying any or all of the persistent conditions at an early date in order to return the child in the near future.
7. That the initiation of a relationship with the mother will hurt the child, especially regarding permanency.
8. That it is in the child's best interest to terminate the [Mother's] parental rights.

Mother appeals the termination of her parental rights to C.S. to this Court.

III.

ISSUES FOR REVIEW

Mother states her issue as follows: Whether the Trial Court erred in finding that the proof presented by the Appellee [Grandmother] established by clear and convincing evidence that the Mother's parental rights should be terminated?

However, in actuality Mother argues three separate issues, all of which we will address. Those issues are as follows:

1. Did the Trial Court err in determining that Grandmother proved by clear and convincing evidence that Mother abandoned her child pursuant to Tenn. Code Ann. § 36-1-113(g)(1)?
2. Did the Trial Court err in finding that Grandmother proved by clear and convincing evidence that Mother failed to remedy persistent conditions in her life that prevented her child's return pursuant to Tenn Code. Ann. § 36-1-113(g)(3)?
3. Did the Trial Court err in finding that termination of Mother's parental rights is in the best interest of her child?

IV.

STANDARD OF REVIEW

Parents have a fundamental right to the care, custody, and control of their children. *Troxel v. Granville*, 530 U.S. 57, 65 (2000); *Hawk v. Hawk*, 855 S.W.2d 573, 578-579 (Tenn. 1993). However, parental rights may be terminated if the State proves by clear and convincing evidence that termination is justified under the applicable statute and is in the best interest of the child. Tenn. Code Ann. § 36-1-113(c), *In re Valentine*, 79 S.W.3d 539, 546 (Tenn. 2002). The heightened burden of proof in these type of cases ensures that "there is no serious or substantial doubt about the correctness of the conclusions drawn from the evidence." *Id.* The evidence "should produce in the fact-finder's mind a firm belief or conviction as to the truth of the allegations sought to be established." *In re A.D.A.*, 84 S.W.3d 592, 598 (Tenn. Ct. App. 2002).

The findings of fact of a trial court are reviewed *de novo* upon the record with a presumption of correctness. Tenn. R. App. P. 13(d). However, the heightened burden of proof in these types of cases demands a further inquiry: if it is determined that the trial court's findings of fact are supported

by a preponderance of the evidence, then this Court must decide whether “the combined weight of the individual facts provides clear and convincing evidence supporting the trial court’s ultimate factual conclusion.” *In re Z.J.S.*, No. M2002-02235-COA-R3-JV, 2003 WL 21266854, at *10 (Tenn. Ct. App. M.S., June 3, 2003); *In re M.J.B.*, 140 S.W.3d 643, 645 (Tenn. Ct. App. 2004) (citing *Jones v. Garrett*, 92 S.W.3d 835, 838 (Tenn. 2002)). If the trial court has not made a specific finding of fact on a particular matter, the facts in the record will be reviewed purely *de novo*. *In re Valentine*, 79 S.W.3d at 546. All issues of law are reviewed *de novo* with no presumption of correctness. *Union Carbide Corp. v. Huddleston*, 854 S.W.2d 87, 91 (Tenn. 1993).

Finally, any one of the statutory grounds for termination of parental rights listed in Tenn. Code. Ann. § 36-1-113(g) is sufficient to support an Order terminating parental rights where termination is in the best interest of the child. *In re Audrey S.*, 182 S.W.3d 838, 860 (Tenn. Ct. App. 2005).

V.

DISCUSSION

1. Did the Trial Court err in determining that Grandmother proved by clear and convincing evidence that Mother abandoned her child pursuant to Tenn. Code Ann. § 36-1-113(g)(1)?

Tenn. Code Ann. § 36-1-113(g)(1) states that termination may be based on “abandonment by the parent or guardian, as defined in § 36-1-102....” Section 36-1-102 states, in pertinent part:

(1)(A) For purposes of terminating the parental or guardian rights of parent(s) or guardian(s) of a child to that child in order to make that child available for adoption, “abandonment” means that:

(i) For a period of four (4) consecutive months immediately preceding the filing of a proceeding or pleading to terminate the parental rights of the parent(s) or guardian(s) of the child who is the subject of the petition for termination of parental rights or adoption, that the parent(s) or guardian(s) either have willfully failed to visit or have willfully failed to support or have willfully failed to make reasonable payments toward the support of the child;

(ii) ...the parent(s) or guardian(s) have made no reasonable efforts to provide a suitable home and have demonstrated a lack of concern for the child to such a degree that it appears unlikely that they will be able to provide a suitable home for the child at an early date;

(iv) A parent or guardian is incarcerated at the time of the institution of an action or proceeding to declare a child to be an abandoned child, or the parent or guardian has been incarcerated during all or part of the four (4) months immediately preceding the institution of such action or proceeding, and either has willfully failed to visit or has willfully failed to support or has willfully failed to make reasonable payments toward the support of the child for four (4) consecutive months immediately preceding such parent's or guardian's incarceration, or the parent or guardian has engaged in conduct prior to incarceration that exhibits a wanton disregard for the welfare of the child; ...

We note that subsections (i), (ii), and (iv) are separated by an “or,” not an “and.” Thus, any one of them may separately form the basis for abandonment under Tenn. Code Ann. § 36-1-113(g)(1).

Mother argues that, per subsection (i) and (iv), she did not willfully fail to visit since she “contacted her mother’s residence to visit her child and spoke with a roommate who told her she would call the police if she came on her mother’s property and was left with an impression that she would not be allowed visitation.” We find this argument to be unpersuasive. We agree with the trial court that the evidence is overwhelming that Mother has chosen not to communicate with C.S. One attempt³ to contact C.S. is quite simply insufficient to negate the Trial Court’s finding of a willful failure to visit. Furthermore, we agree with the Trial Court that one token child support payment does not rise to the level of “reasonable payments” contemplated by the statute. Thus, we find that Mother abandoned her child pursuant to Tenn. Code Ann. § 36-1-113(g)(1) and § 36-1-102(1)(A) subsections (i) and (iv).

Mother also argues that, per subsection (ii), the evidence does not clearly and convincingly show that Mother has failed to make “reasonable efforts to provide a suitable home” for C.S. She contends that she had been drug free for over a year, “was in drug treatment, was employed, and was in the process of making a housing transition to a one bedroom apartment once her voucher was approved.” However, these efforts were either all last minute or unsubstantiated by evidence. For instance, while Mother alleges she is drug free, she did not provide any documentary proof of her participation in a drug treatment program. Furthermore, she had only been employed for one and a half weeks. Based on the inconsistency of her past employment history, such a short time period is insufficient to form a positive inference that she will be employed in the long term. Additionally, her transition out of the half-way house was speculative, especially in the light of her pending felony. Because of the last minute and/or unsubstantiated nature of many of Mother’s arguments, we must conclude that Mother failed to put forth reasonable efforts to provide suitable housing between 2006 and the trial.⁴

³We note that whether this phone call even occurred is disputed.

⁴It does not appear from the record that the trial court made a specific ruling as to subsection (ii). Thus, we review the record *de novo* in reaching our decision. *In re Valentine*, 79 S.W.3d at 546.

2. Did the trial court err in finding that Grandmother proved by clear and convincing evidence that Mother failed to remedy persistent conditions in her life that prevented her child's return pursuant to Tenn. Code. Ann. § 36-1-113(g)(3)?

Tenn. Code. Ann. § 36-1-113(g)(3) provides that termination of parental rights is appropriate when:

The child has been removed from the home of the parent or guardian by order of a court for a period of six (6) months and:

(A) The conditions that led to the child's removal or other conditions that in all reasonable probability would cause the child to be subjected to further abuse or neglect and that, therefore, prevent the child's safe return to the care of the parent(s) or guardian(s) still persist;

(B) There is little likelihood that these conditions will be remedied at an early date so that the child can be safely returned to the parent(s) or guardian(s) in the near future; and

(C) The continuation of the parent or guardian and child relationship greatly diminishes the child's chances of early integration into a safe, stable and permanent home.

Termination of parental rights under the above statute section requires clear and convincing evidence of all three factors. *In re Valentine*, 79 S.W.3d at 550. There is no dispute that C.S. had been removed from Mother for more than six months.

Mother's argument somewhat conflates the three factors. As such, her primary argument is that the majority of the conditions which led to the child's removal do not still exist. She again reiterates that she had addressed her drug problem by entering treatment and staying drug free for a year. She further contends that she was close to having housing of her own, and that she has "just one pending criminal matter and was completing probation on her other one." Thus, she alleges that any detrimental conditions that still exist would be remedied in the near future. She also contends that there was no testimony that established that the continuation of the parent-child relationship would diminish the child's chances of being integrated into a stable and permanent home.

Based on this Court's above analysis concerning the abandonment of C.S., we are obligated to affirm the Trial Court's holding that Grandmother proved by clear and convincing evidence that Mother failed to remedy persistent conditions in her life that prevented her child's return pursuant to Tenn. Code. Ann. § 36-1-113(g)(3). Regarding factor (A), the Trial Court found that while Mother may have made some progress on sobriety, she had made little to no progress on employment, avoiding incarceration, or providing suitable housing. We agree, and echo our above

finding that Mother's arguments are undercut by the last minute and/or unsubstantiated nature of her claims. Thus, we find that the conditions which led to C.S.'s removal clearly and convincingly continue to exist.

Concerning factor (B), the Trial Court found there was insufficient progress concerning continued employment, housing, and avoiding incarceration that would suggest those conditions will be remedied at an early date so that the child can be safely returned to Mother. Based on Mother's pending felony, the speculative nature of whether she will be able to move out of the half-way house, her unproven ability to maintain her new job, and the testimony of Mother's own witness that her recovery would take a "long time," we concur the evidence clearly and convincingly supports the Trial Court's findings.

Turning to factor (C), the Trial Court found that "the initiation of a relationship with Mother will hurt the child." It is clear that, even with Mother's alleged progress in sobriety, her life is still rife with instability, unpredictability, and undependability. Meanwhile, the testimony at trial showed that C.S. is currently in a stable environment where he is loved and well taken care of. When taken together, this Court must conclude that the Trial Court was correct in determining that a continued a relationship with Mother would be clearly and convincingly detrimental to C.S.

3. Did the Trial Court err in finding that termination of Mother's parental rights is in the best interest of her child?

Mother contends that the record lacks any testimony that suggests that the termination of Mother's parental rights would be in the best interest of C.S. We must disagree. The testimony plainly shows that C.S. is currently in a stable environment where his needs are provided for. At the same time, it is clear that Mother still faces an uncertain future regarding her job, housing, and incarceration. Thus, we concur with the Trial Court that termination of the parental relationship is clearly and convincingly in the best interest of C.S.

VI.

CONCLUSION

1. The judgment of the Trial Court finding that Grandmother proved by clear and convincing evidence that Mother abandoned her child pursuant to Tenn. Code Ann. § 36-1-113(g)(1) is affirmed.
2. The judgment of the Trial Court finding that Grandmother proved by clear and convincing evidence that Mother failed to remedy persistent conditions in her life that prevented her child's return pursuant to § 36-1-113(g)(3) is affirmed.

3. The judgment of the Trial Court finding that termination of Mother's parental rights is in the best interest of her child is affirmed.

Thus, the judgment of the Trial Court is affirmed in its entirety. Costs on appeal are taxed to the Appellant. The case is remanded to the Trial Court for enforcement of the court's judgment and for collection of costs assessed below, pursuant to applicable law.

JOHN W. McCLARTY, JUDGE